

CENTER FOR DISABILITY ACCESS
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Brian Whitaker

Plaintiff,

v.

Zale Delaware, Inc., a Delaware
Corporation

Defendant.

Case No.

**Complaint For Damages And
Injunctive Relief For Violations
Of: Americans With Disabilities
Act; Unruh Civil Rights Act**

Plaintiff Brian Whitaker complains of Zale Delaware, Inc., a Delaware Corporation; and alleges as follows:

PARTIES:

1. Plaintiff is a California resident with physical disabilities. He is substantially limited in his ability to walk. He suffers from a C-4 spinal cord injury. He is a quadriplegic. He uses a wheelchair for mobility.

2. Defendant Zale Delaware, Inc. owned Piercing Pagoda located at or about 865 Market St, San Francisco, California, in January 2021.

3. Defendant Zale Delaware, Inc. owns Piercing Pagoda located at or about 865 Market St, San Francisco, California, currently.

4. Plaintiff does not know the true names of Defendants, their business

1 capacities, their ownership connection to the property and business, or their
2 relative responsibilities in causing the access violations herein complained of,
3 and alleges a joint venture and common enterprise by all such Defendants.
4 Plaintiff is informed and believes that each of the Defendants herein is
5 responsible in some capacity for the events herein alleged, or is a necessary
6 party for obtaining appropriate relief. Plaintiff will seek leave to amend when
7 the true names, capacities, connections, and responsibilities of the Defendants
8 are ascertained.

9
10 **JURISDICTION & VENUE:**

11 5. The Court has subject matter jurisdiction over the action pursuant to 28
12 U.S.C. § 1331 and § 1343(a)(3) & (a)(4) for violations of the Americans with
13 Disabilities Act of 1990, 42 U.S.C. § 12101, et seq.

14 6. Pursuant to supplemental jurisdiction, an attendant and related cause
15 of action, arising from the same nucleus of operative facts and arising out of
16 the same transactions, is also brought under California's Unruh Civil Rights
17 Act, which act expressly incorporates the Americans with Disabilities Act.

18 7. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b) and is
19 founded on the fact that the real property which is the subject of this action is
20 located in this district and that Plaintiff's cause of action arose in this district.

21
22 **FACTUAL ALLEGATIONS:**

23 8. Plaintiff went to Piercing Pagoda in January 2021 with the intention to
24 avail himself of its goods or services and to assess the business for compliance
25 with the disability access laws.

26 9. Piercing Pagoda is a facility open to the public, a place of public
27 accommodation, and a business establishment.

28 10. Unfortunately, on the date of the plaintiff's visit, the defendants failed

1 to provide wheelchair accessible sales counters in conformance with the ADA
2 Standards as it relates to wheelchair users like the plaintiff.

3 11. Piercing Pagoda provides sales counters to its customers but fails to
4 provide any wheelchair accessible sales counters.

5 12. A problem that plaintiff encountered is that the sales counter was too
6 high. Although there was a lowered counter, plaintiff conducted his
7 transaction at the higher counter, which was 43 inches in height. There was no
8 point-of-sale machine at the lowered counter and the business did not attempt
9 to use the lowered counter for conduct the transaction.

10 13. Plaintiff believes that there are other features of the sales counters that
11 likely fail to comply with the ADA Standards and seeks to have fully compliant
12 sales counters for wheelchair users.

13 14. On information and belief, the defendants currently fail to provide
14 wheelchair accessible sales counters.

15 15. These barriers relate to and impact the plaintiff's disability. Plaintiff
16 personally encountered these barriers.

17 16. As a wheelchair user, the plaintiff benefits from and is entitled to use
18 wheelchair accessible facilities. By failing to provide accessible facilities, the
19 defendants denied the plaintiff full and equal access.

20 17. The failure to provide accessible facilities created difficulty and
21 discomfort for the Plaintiff.

22 18. The defendants have failed to maintain in working and useable
23 conditions those features required to provide ready access to persons with
24 disabilities.

25 19. The barriers identified above are easily removed without much
26 difficulty or expense. They are the types of barriers identified by the
27 Department of Justice as presumably readily achievable to remove and, in fact,
28 these barriers are readily achievable to remove. Moreover, there are numerous

1 alternative accommodations that could be made to provide a greater level of
2 access if complete removal were not achievable.

3 20. Plaintiff will return to Piercing Pagoda to avail himself of its goods or
4 services and to determine compliance with the disability access laws once it is
5 represented to him that Piercing Pagoda and its facilities are accessible.
6 Plaintiff is currently deterred from doing so because of his knowledge of the
7 existing barriers and his uncertainty about the existence of yet other barriers
8 on the site. If the barriers are not removed, the plaintiff will face unlawful and
9 discriminatory barriers again.

10 21. Given the obvious and blatant nature of the barriers and violations
11 alleged herein, the plaintiff alleges, on information and belief, that there are
12 other violations and barriers on the site that relate to his disability. Plaintiff will
13 amend the complaint, to provide proper notice regarding the scope of this
14 lawsuit, once he conducts a site inspection. However, please be on notice that
15 the plaintiff seeks to have all barriers related to his disability remedied. See
16 *Doran v. 7-11*, 524 F.3d 1034 (9th Cir. 2008) (holding that once a plaintiff
17 encounters one barrier at a site, he can sue to have all barriers that relate to his
18 disability removed regardless of whether he personally encountered them).

19
20 **I. FIRST CAUSE OF ACTION: VIOLATION OF THE AMERICANS**
21 **WITH DISABILITIES ACT OF 1990** (On behalf of Plaintiff and against all
22 Defendants.) (42 U.S.C. section 12101, et seq.)

23 22. Plaintiff re-pleads and incorporates by reference, as if fully set forth
24 again herein, the allegations contained in all prior paragraphs of this
25 complaint.

26 23. Under the ADA, it is an act of discrimination to fail to ensure that the
27 privileges, advantages, accommodations, facilities, goods and services of any
28 place of public accommodation is offered on a full and equal basis by anyone

1 who owns, leases, or operates a place of public accommodation. See 42 U.S.C.
2 § 12182(a). Discrimination is defined, inter alia, as follows:

- 3 a. A failure to make reasonable modifications in policies, practices,
4 or procedures, when such modifications are necessary to afford
5 goods, services, facilities, privileges, advantages, or
6 accommodations to individuals with disabilities, unless the
7 accommodation would work a fundamental alteration of those
8 services and facilities. 42 U.S.C. § 12182(b)(2)(A)(ii).
- 9 b. A failure to remove architectural barriers where such removal is
10 readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). Barriers are
11 defined by reference to the ADA Standards.
- 12 c. A failure to make alterations in such a manner that, to the
13 maximum extent feasible, the altered portions of the facility are
14 readily accessible to and usable by individuals with disabilities,
15 including individuals who use wheelchairs or to ensure that, to the
16 maximum extent feasible, the path of travel to the altered area and
17 the bathrooms, telephones, and drinking fountains serving the
18 altered area, are readily accessible to and usable by individuals
19 with disabilities. 42 U.S.C. § 12183(a)(2).

20 24. When a business provides facilities such as sales or transaction counters,
21 it must provide accessible sales or transaction counters.

22 25. Here, accessible sales or transaction counters have not been provided in
23 conformance with the ADA Standards.

24 26. The Safe Harbor provisions of the 2010 Standards are not applicable
25 here because the conditions challenged in this lawsuit do not comply with the
26 1991 Standards.

27 27. A public accommodation must maintain in operable working condition
28 those features of its facilities and equipment that are required to be readily

1 accessible to and usable by persons with disabilities. 28 C.F.R. § 36.211(a).

2 28. Here, the failure to ensure that the accessible facilities were available
3 and ready to be used by the plaintiff is a violation of the law.

4
5 **II. SECOND CAUSE OF ACTION: VIOLATION OF THE UNRUH CIVIL**
6 **RIGHTS ACT** (On behalf of Plaintiff and against all Defendants.) (Cal. Civ.
7 Code § 51-53.)

8 29. Plaintiff repleads and incorporates by reference, as if fully set forth
9 again herein, the allegations contained in all prior paragraphs of this
10 complaint. The Unruh Civil Rights Act (“Unruh Act”) guarantees, inter alia,
11 that persons with disabilities are entitled to full and equal accommodations,
12 advantages, facilities, privileges, or services in all business establishment of
13 every kind whatsoever within the jurisdiction of the State of California. Cal.
14 Civ. Code § 51(b).

15 30. The Unruh Act provides that a violation of the ADA is a violation of the
16 Unruh Act. Cal. Civ. Code, § 51(f).

17 31. Defendants’ acts and omissions, as herein alleged, have violated the
18 Unruh Act by, inter alia, denying, or aiding, or inciting the denial of, Plaintiff’s
19 rights to full and equal use of the accommodations, advantages, facilities,
20 privileges, or services offered.

21 32. Because the violation of the Unruh Civil Rights Act resulted in difficulty,
22 discomfort or embarrassment for the plaintiff, the defendants are also each
23 responsible for statutory damages, i.e., a civil penalty. (Civ. Code § 55.56(a)-
24 (c).)

25
26 **PRAYER:**

27 Wherefore, Plaintiff prays that this Court award damages and provide
28 relief as follows:

1 1. For injunctive relief, compelling Defendants to comply with the
2 Americans with Disabilities Act and the Unruh Civil Rights Act. Note: the
3 plaintiff is not invoking section 55 of the California Civil Code and is not
4 seeking injunctive relief under the Disabled Persons Act at all.

5 2. Damages under the Unruh Civil Rights Act, which provides for actual
6 damages and a statutory minimum of \$4,000 for each offense.

7 3. Reasonable attorney fees, litigation expenses and costs of suit, pursuant
8 to 42 U.S.C. § 12205; and Cal. Civ. Code §§ 52.

9
10 Dated: February 19, 2021

CENTER FOR DISABILITY ACCESS

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12 By:  _____

13 Amanda Seabock, Esq.
14 Attorney for plaintiff
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